In The

Supreme Court of the United States

October Term, 1978

Nos. 78-160, 161 and 162

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson, and R. G. P. Incorporated, Otis Peterson, Travelers Insurance Company, State of Iowa and State Conservation Commission of the State of Iowa,
Petitioners,

vs.

Omaha Indian Tribe and United States of America,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS IN REPLY TO BRIEFS FOR THE UNITED STATES AND THE OMAHA INDIAN TRIBE IN OPPOSITION TO PETITION FOR CERTIORARI

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A. REPLY TO BRIEF OF THE UNITED STATES

This case is an appropriate vehicle for the determination of the questions of the constitutionality, interpretation and applicability of 25 U. S. Code § 194, which are indeed ripe for review.

The only point in the brief of the United States in opposition to the Petitions for Certiorari which appears to call for a reply, is the argument that the questions of the constitutionality and of the interpretation and applicability of Section 194 are not now ripe for review—that the instant case is not an appropriate vehicle for their consideration by this court, because (1) there is no conflict between the Circuits since this is a case of first impression, there being no recorded decision prior to the

instant case which has considered the constitutionality or the construction of Section 194, (2) in the instant case, the questions received little attention, and (3) no lower Court has considered the constitutionality of Section 194 in the light of the *Bakke* decision.

We submit that the foregoing arguments would provide no justification for a refusal by this Court to consider this case. On the questions of constitutionality and construction of Section 194, the issues are simple and clear. Do the words "an Indian" in Section 194 mean an incorporated Indian tribe? Do the words "a white person" mean all non-Indians including individuals whose race and color are not shown in the record, a private corporation and a sovereign state? Does a statute which takes their property from non-Indians and awards it to an Indian tribe solely because of race, deprive those non-Indians of their property without due process in violation of the due process clause of the 5th Amendment? These questions require no additional lower Court decisions to present them squarely to this Court.

Nor does the fact that in the Court of Appeals' opinion these questions received little attention provide an argument against granting certiorari. Should such a Court of Appeals' opinion be less subject to review by this Court than one which thoroughly considers all of the arguments? Need this Court await the decisions of two Circuits to tell it what its *Bakke* decision means as applied to Section 194?

We submit that the questions of the interpretation and constitutionality of Section 194 are, indeed, ripe for determination by this Court. These questions are of great

importance to the petitioners who invested millions of dollars in the land involved before any claim to it was ever asserted by the Omaha Tribe or by the United States. These questions are of great importance to Gordon Dahl and the 81 other farm owners in Monona County whose lands are claimed by the Omaha Tribe in the part of Case No. C 75-4067 which has not yet been tried. Their tracts claimed by the Tribe average 186 acres in size, a total of 6500 acres, valued at thirteen million dollars. These questions are of great importance to the 30 States which filed Briefs *Amicus Curiae* in support of the petition of the State of Iowa for certiorari. These questions are of great importance to the 2200 members—land title insurers, their agents, and associate members—of the American Land Title Association, as shown by the brief *amicus* of that association. In other words, these questions are of great public importance.

Rule 19 of the Rules of this Court calls for no such delay. It says:

> 1. A review on writ of certiorari . . . will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> * * *
>
> (b) Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; . . .

As to the conflict with applicable decisions of this Court, we note that the brief of the United States (page

17), concedes that the holding of the Court of Appeals conflicts with the holding by the Special Master of this Court "in all things confirmed" by this Court in *Louisiana v. Mississippi,* 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966), that a change in the channel within the bed of a river does not constitute an avulsion. See page 26 of the Petition for Certiorari, No. 78-160. And, clearly, the questions of the interpretation and constitutionality of Section 194 are important questions of Federal law which have not been but should be settled by this Court.

B. REPLY TO BRIEF OF OMAHA INDIAN TRIBE

The questions of the constitutionality and applicability of 25 U. S. Code § 194 are crucial to the Court of Appeals' decision in this case.

In his Brief for the Omaha Indian Tribe in Opposition to the Petitions for Certiorari, counsel for the Tribe, having previously urged the District Court and the Court of Appeals to apply 25 U. S. Code § 194, now argues that this Court need not reach the questions of the applicability and the constitutionality of § 194. He asserts that by pleading that after Barrett made his survey in 1867, the Barrett survey area was eroded away and washed down the river and that the land presently occupying that area under the sky is accretion to the Iowa riparian land, Petitioners voluntarily assumed the burden of proof (risk of non-persuasion) and were, therefore, not affected by the Court of Appeals' application of § 194.

But, as applied by the Court of Appeals, § 194 did not merely place a burden of proof on Petitioners. It relieved the Tribe and the United States of any burden of proof in this quiet title action in which they are the plaintiffs.

The trial court (Opinion, App. C. 17, 18) said:

> . . . generally a claimant, whether a Plaintiff or a counterclaiming Defendant, has the burden of persuasion in a quiet title action as to the strength of his or her own title. (Citing 65 Am. Jur. 2d 207-208, Quieting Title § 78 (1972).)

So the trial court put the burden of proof on the plaintiffs on their complaints and on the defendants on their counterclaims. And, in the absence of § 194, that is the way it would be, subject to the application of certain presumptions or inferences we refer to later.

Nowhere does the Court of Appeals claim that the Tribe or the United States sustained the burden of proof they would have in the absence of § 194. On the contrary, it held that since it was shown that the Tribe or the United States, as trustee for the Tribe or for its members, owned land or river bed in the Barrett survey area in 1867, that was all that was required to make a case for them—§ 194 did the rest. The Court of Appeals said:

> . . . the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines. This historical fact shows "previous possession or ownership" and is sufficient to raise a presumption of title in the Tribe under the statute [§ 194] and to place the burden of proof on the defendants. (App. A21, 22).

Other than by that presumption, the Court of Appeals did not claim that the Tribe or the United States had proved the occurrence of any avulsion or avulsions. It said:

> Although it is possible that the land represented by bar C may have completely eroded, . . . the record is insufficient to prove what actually occurred. (App. A44).
>
> None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstances shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion. (App. A49).
>
> We conclude on the basis of an overall review of the record that it is entirely speculative to determine when or how the thalweg moved to the position shown on the 1923 map. (App. A65).
>
> These established facts do not prove that either accretion or avulsion caused the river's movement. (App. A62).

So, adhering to its dependence on § 194 for its decision, the Court of Appeals, coming to the conclusion of its opinion said:

> We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194 (App. A62). Under the circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194. (App. A65).

How different is the situation with § 194 eliminated! The burden of persuasion would be upon the Omaha Tribe to prove its title and upon the defendants to prove theirs. But favoring defendants are a number of presumptions which are briefly listed on Page 22 of the Petition for

Certiorari, No. 78-160. These include the strong presumption in favor of accretion as against avulsion.[1]

That has been characterized by the courts as a strong presumption,[2] founded on long experience and observation that accretion is usual and avulsion is exceptional. But, it is really more than a presumption, and has become the rule of the live thalweg, requiring clear and convincing evidence of a cutoff to satisfy the burden of persua-

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1 The trial judge, Honorable Andrew W. Bogue, found that Nebraska law applied and that under Nebraska law defendants would not have the benefit of the presumption in favor of accretion as against avulsion which would be applicable if federal or Iowa law were applied (App. C15, 16). However, the cases cited by Judge Bogue are not accretion versus avulsion cases. They involved questions of to whose land would accretion attach, and of adverse possession, and the presumption of accretion versus avulsion was not raised. We see no reason why Nebraska law would not apply that presumption in an avulsion versus accretion case. Except for that presumption and ownership of the bed of the river to the thalweg in Iowa by the State and in Nebraska by the riparian owners, Judge Bogue noted that he had "researched both federal and Iowa law of accretion and avulsion and found that, as to definitions of those terms with respect to the Missouri River, there are no significant differences among federal, Iowa and Nebraska laws which are relevant to this case." (App. C17).

2 Under Nebraska law, Sec. 27-301 R. R. S. Nebr. 1943, the "presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

Under Iowa law, the "nonexistence of the presumed fact must be conclusively established before presumption can be eliminated." *Beggs v. Metropolitan Life Insurance Company,* 219 Iowa 24, 257 N. W. 445, 95 A. L. R. 863 (1934); *Johnson v. Marshall,* 232 Iowa 299, 4 N. W. 2d 369 (1942).

Under federal law, if Rule of Evidence No. 301 limits its effect as a presumption, the strong inference from the factual basis for the presumption of accretion remains as circumstantial evidence of accretion. 29 Am. Jur. 2d 203, Evidence § 165.

sion of one claiming an avulsion. (See, Footnote 2, p. 10 and pp. 26 and 27 of Petition for Certiorari, No. 78-160.)

In the absence of § 194, with each party having the burden of proving his own case, the court would have to decide which side had sustained its burden of proof giving due weight to presumptions, inferences and the evidence. This the trial court did. Because of § 194, the Court of Appeals did not.

If that could not be done and the Court were to say (as the Court of Appeals seems to say) that the evidence is all so speculative and conjectural that it cannot decide in favor of either side, then it would seem that the complaints and counterclaims of all parties would have to be dismissed and the Federal Court injunction[3] against Petitioners and against the state court would have to be dissolved. That would restore jurisdiction to the Iowa State Court and reinstate its injunction against the Indians, who, with the connivance of certain employees in the Bureau of Indian Affairs, in April of 1975, invaded the Barrett survey area and wrested the occupancy of that land from the Petitioners.

Section 194 is indeed the crux of the Court of Appeals' decision.

Respectfully submitted,

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3 The injunction reproduced as Appendix III to the brief of the Omaha Indian Tribe in Opposition to the Petitions for Certiorari was issued by Judge McManus on June 5, 1975. Before that, Clark, the surveyor employed by the B. I. A., and Robinson, the geologist employed by Clark, had spent months assembling maps and other materials, and had submitted to the B. I. A. elaborate reports in September of 1974, showing, as was shown at the trial, that all of the significant movements of the river in the Blackbird Bend area occurred prior to 1927, and before the commencement of any work by the U. S. Engineers (which did not start until 1936) in the area. Nevertheless, plaintiffs submitted to Judge McManus a memo signed by the Solicitor of the Department of the Interior, dated 2/3/75, stating:

> . . . The Army Corps of Engineers undertook a program in the 1940s to rechannelize the Missouri River to reduce flooding and to stabilize the location of the river. The rechannelization had the effect of cutting the Blackbird Bend oxbow off from the rest of the reservation. The oxbow became part of the eastern bank of the Missouri River for the first time. Not only had it shifted to Iowa's jurisdiction under the 1943 Compact, but geophysically, it became contiguous with the eastern bank due to the cessation of flow around the oxbow.

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Based on that completely erroneous statement of fact, Judge McManus issued the injunction putting the Tribe in possession of the Barrett survey area pending trial. Note the second paragraph beginning on page 4a and the third paragraph beginning on page 6a of said Appendix III. After defendants had had time to employ an expert to make a study and a report, they attempted to obtain a hearing from Judge McManus on their application for a return of possession of the land pending trial, but their application was denied without hearing.